BRUNEI REPORT

Lamat bin Burut v PP

COURT OF APPEAL (BANDAR SERI BEGAWAN) — CRIMINAL APPEAL NO 3 OF 1992
TL YANG LP, NAZARETH AND MCMULLIN COMMISSIONERS
3 DECEMBER 1992

Criminal Law *— Possession of ammunition and explosives — Whether possession proved — What amounts to possession — Public Order Act (Cap 148) s 28*

Criminal Procedure *— Cautioned statements — Whether voluntary — Whether court can reject statements obtained unfairly or by trickery or oppressively — Whether adverse inference may be drawn from accused's silence — Criminal Procedure Code s 117*

Criminal Procedure *— Cautioned statements — Whether recording officer has to explain meaning of caution — Criminal Procedure Code s 117*

The appellant was convicted on two charges of possession of ammunition and explosives respectively without lawful authority or excuse under s 28 of the Public Order Act (Cap 148) ('the Act'). He appealed on the grounds, inter alia, that his statements to the police were involuntary and therefore inadmissible and that there was no evidence of possession of the offending items.

Held, allowing the appeal:

(1) Section 117 of the Criminal Procedure Code ('the CPC') has made a substantial change to the common law in that the right of silence has been taken away. Adverse inferences may be drawn from an accused person's refusal to give a statement in his defence after a warning has been issued under s 117(3) of the CPC. Nevertheless, the prosecution must still prove that the statement was voluntary although the warning cannot be construed as a threat to render it involuntary.

(2) The recording officer need not explain the warning to the accused but need only inform him in a language he understands of the charges which will be brought and the effect of the warning and no further.

(3) Although counsel did not object to the introduction of inadmissible evidence, the court still had a discretion to exclude such evidence if it was obtained unfairly, by trickery, or oppressively and if it may lead to a miscarriage of justice. Based on the evidence, there is nothing to show that the statements were made involuntarily or that oppression was used and the lower court had rightly admitted the statements in evidence.

(4) The statement made by the accused's wife was admissible to show only how the police discovered the ammunition and the explosives.

It did not prove the truth of what she said, but showed her knowledge of the existence and location of the ammunition and the explosives. The statement did not connect the accused with knowledge or possession of the offending items. Section 6 of the Evidence Act is inapplicable here.

(5) The accused lost possession of the ammunition and explosives when his wife removed them to another place. There is no evidence that his wife knew or that the accused had entrusted it to her, neither was she his agent nor was she acting for him.

Cases referred to

1 *R v Priestley* 51 Cr App R 1; [1966] Crim LR 507 (refd)
2 *PP v Md Ali bin Burut et al* (Criminal Trial No 9 of 1991) (unreported) (refd)
3 *R v Ellis* [1910] 2 KB 746 (refd)
4 *Stirland v DPP* [1944] AC 315; [1944] 2 All ER 13 (refd)
5 *R v Watson* [1980] 2 All ER 293; [1980] 1 WLR 991 (refd)
6 *R v Sang* [1980] AC 402; [1979] 2 All ER 1222 (refd)
7 *R v Kwabena Poku* [1978] Crim LR 488 (refd)
8 *Mohd Ali bin Burut et all v PP* (Criminal Appeal No 2 of 1992) (unreported) (folld)

Legislation referred to

Public Order Act (Cap 148) s 28(2), (3)
Criminal Procedure Code s 117

Francis Chiew (*Francis Chiew & Co*) for the appellant.
Ivan Leong and *Ahmad Basuni* (Deputy Public Prosecutors) for the respondent.

Cur Adv Vult

Yang LP (delivering the judgment of the court): The appellant Lamat bin Burut ('Lamat') and his co-accused Mohd Ali bin Burut ('Mohd Ali') came before the learned Chief Justice and Commissioner Downey on 21 April 1992 on charges brought under s 28 of the Public Order Act ('the Act'). They both pleaded not guilty to their respective charges.

Lamat was found guilty of charges 1 and 2 and not guilty of charge 3. Mohd Ali was found not guilty of charges 4 and 5. This is Lamat's appeal against his conviction on the amended charges 1 and 2.

Charges 1 and 2 as amended are as follows:

1 Section 28 Public Order Act (Cap 148) — Possession of ammunition without lawful authority therefore and in a special area without lawful excuse.

That you on or about 12 December 1990, at Lot 5921, Kampong Bintudoh, Lamunin, Tutong, Brunei Darussalam, in a special area without lawful excuse did have in your possession ammunition without lawful authority therefore, to wit:

133 rounds of 5.56mm ammunition
145 rounds of .22 ammunition
Four rounds BB shot gun cartridges
Three rounds of 12 bore SG shot gun cartridges

and you thereby committed an offence contrary to s 28 of the Public Order Act and punishable under the same.

2 Section 28 Public Order Act (Cap 148) — Possession of explosives without lawful authority therefore and in a special area without lawful excuse.

That you on or about 12 December 1990, at Lot 5921 Kampong Bintudoh, Lamunin, Tutong, Brunei Darussalam, in a special area without lawful excuse did have in your possession explosives without lawful authority therefore, to wit, explosives as follows:

Six rounds mini flare cartridges (cartridge signal 16mm red)
Three mini flare launchers (containers signal kit)

and you thereby committed an offence contrary to s 28 of the Public Order Act and punishable under the same.

The word 'ammunition' is defined in s 2(1) of the Act. The word 'explosive' is also defined in the same subsection of the Act.

By s 28(2) and (3) of the Act it is provided that:

(2) A person shall be deemed to have lawful authority for the purpose of this section only if he —

(a) is a member of any security force or a prison officer and is carrying or is in possession of or has under his control such firearm, ammunition or explosive in or in connection with the performance of his duty; or
(b) is a person fully licensed, or authorized without a licence, under the provisions of any written law for the time being in force to carry, possess or have under his control such firearm, ammunition or explosive; or
(c) is a person exempted from the provisions of this section, or is a member of a class of persons so exempted, by the Commissioner of Police by notification in the Government Gazette:

Provided that no person shall be deemed to have lawful authority for the purposes of this section or to be exempt from this section if he carries or has in his possession or under his control any such firearm, ammunition or explosive for the purpose of using the same in a manner prejudicial to public safety or the maintenance of public order.

(3) A person shall be deemed to have lawful excuse for the purposes of this section only if he proves —

(a) that he acquired such firearm, ammunition or explosive in a lawful manner and for a lawful purpose; and
(b) that he has not at any time while carrying or having in his possession or under his control such firearm, ammunition or explosive, acted in a manner prejudicial to public safety or the maintenance of public order.

The ammunition was examined by PW3 Mr Graham Keith Chubb, the senior ammunition officer in the Royal Brunei Armed Forces ('the RBAF'). He found that the 133 rounds of 5.56mm ammunition would fit a M16

rifle. They appeared to be serviceable though some were mildly corroded. They seemed to be live bullets, with proper explosives and cartridges. The 145 rounds of .22 ammunition were live and serviceable. The two types of shotgun cartridges were live. The flares and launchers were part of the same kit. The flare was an explosive device: it was a solid lump of pyrotechnics and could cause extensive injuries to the person. Mr Chubb could think of no lawful excuse for a soldier to have the six items in the two charges in his house or to throw them into the jungle. It would be a military offence for a soldier to keep these items in his possession, if he had acquired them from the RBAF.

The evidence of the police officers who gave evidence for the Crown was summarized by the learned trial judges in their judgment.

Lamat made a number of oral statements to police officers. He also made two written statements. One was made on 22 December 1990 under s 117(1) of the Criminal Procedure Code ('the CPC'), between 1020 and 1150 hours. It was recorded by ASP Azahari and witnessed by Cpl Sabtu. The other statement was made after warning under s 117(3) of the CPC on 24 December 1990 between 1615 and 1630 hours. It was recorded by SI Hairuni and witnessed by PC 2561 Lanki. These two statements were made the subject matter of a voire dire. At the end of the voire dire the judges ruled, by a majority, that the statements were voluntary.

The findings of the court below

Briefly, the learned judges' findings of facts relating to charges 1 and 2 are as follows:

The court accepted the evidence of Mr Chubb (supra) and found all the ammunition in question lethal and serviceable. The flare itself contained 'explosives' within the meaning of para (a) of the definition in the Act. The flare launcher falls within para (c) of the definition, since it was used in conjunction with a flare and was 'material used or intended to be used or adapted for causing or aiding in causing any explosion in or with any explosive'.

Lamat was a member of the RBAF from 21 October 1972 until 1 April 1990 when he retired. He was a regimental police officer for ten years, and .22 ammunition was used for dog shooting in the camps until late 1990, in which Lamat had taken part. How he acquired the rounds of ammunition 'remains a matter of speculation'. On the evidence the judges found that the ammunition and explosive came from the RBAF.

Lamat was arrested at about 2030 hours on 12 December 1990 whilst visiting the flat of his brother Mohd Ali. He was then taken to Tutong police station.

On the instruction of ASP Azahari, PW4 S/M Bagol interviewed Lamat the following day, on 13 December, at about 1700 hours. Bagol asked Lamat where he kept his ammunition and he replied, 'If it's not been removed, it is buried in the ground near the banana tree behind my house'. Bagol then asked Lamat, 'Besides yourself Lamat, who also knows about the ammunition?' Lamat replied, 'Only me and my fourth wife and Duraman'.

During the interview Lamat admitted that he had in his possession 'M16 ammunition, .22 ammunition, shotgun cartridges and mini-flare equipment'.

At about 1740 hours on the same day Bagol, Lamat and a police party went to Lamat's house. Lamat led the way to a hole in the ground which contained an empty wooden box. Lamat said, 'Oh the place has been dug up'. Bagol asked where the ammunition was, and Lamat replied, 'Wait till my wives get back. Maybe they have removed it. My wife Norlela may know about this'. About 1900 hours Lamat's three wives returned to the house. After a conversation in private with Lamat in the bedroom lasting about three minutes, Norlela and Lamat came out. Norlela said she had removed the ammunition and she wanted to show Bagol where it was. She added, 'I did not know the contents of the green tin. I did not open it. But I know the place where I threw it. Come I will show you'.

She then led a police party to the place where she said she had thrown away the box. In the party were Norlela, Lamat, Adiana (Lamat's other wife), Bagol, ASP Pg Wahab (PW7) and other police officers. They arrived at a junction on the Binutong Road about two miles from the house. Lamat remained in the car when Norlela went to point at the steel box. Norlela pointed at a green steel box and said, 'That's it'. The box contained ammunition and explosives, subject matter of charges 1 and 2. These items were taken to Tutong police station, where the contents of the box were laid out. When asked if this was his ammunition, Lamat admitted that it was.

Bagol recorded in his notebook what had taken place, some of the entries were signed by him, some were not. The judges found that Bagol's evidence was 'corroborated, in all important particulars, by Wahab's evidence and by entries in the latter's notebook'.

The judges also found that the only reasonable inference from Lamat's conduct in leading the police there, from his admission to Bagol and from the statement of Norlela in his presence, was that the metal box must have been inside the wooden box found in Lamat's compound.

The judges went on to say that:

> We do not know when the metal box was thrown away by Norlela though it seems likely to have been on 12 or 13 December. If the metal box was hidden in the wooden box until 12 December, at the time of Lamat's arrest, the latter was in possession of the box and its contents, if he knew that the box contained live ammunition and material which he had put in it himself or which others had placed there with his express or tacit permission.

The judges noted that Lamat's defence was that he did not know that a box had been put in his garden by Duraman, that he did not know what it contained, that he had told the police this on several occasions and that he never admitted he possessed the ammunition. The learned judges however accepted the evidence of the police officers who said Lamat led them to the hole in the ground and that he admitted the ammunition belonged to him.

The judges further accepted the statement of Lamat of 22 December that in June, Duraman had made a wooden box and that 'we together put the ammunitions (sic) and pistol into an ammunition box and then into a wooden box, buried at the rear of my house not far from the banana tree'.

Lamat's evidence was not believed.

Section 117 of the CPC

The section provides that:

> (1) In any criminal proceedings any statement made by any person including a person in the custody of a police whether it amounts to a confession or not or is oral or in writing, made at any time, whether before or after that person is charged and whether in the course of a police investigation or not, by that person to or in the hearing of any police officer shall be admissible in evidence and, if that person tenders himself as a witness, any such statement may be used in cross-examination and for the purpose of impeaching his credit.
> (2) The Court shall admit under subsection (1) a statement made by an accused, only if the prosecution satisfies the Court that the statement was voluntary, that is to say that it was not obtained by violence, inducement, threat or oppression by a person in authority.
> (3) Where any person is charged with an offence or officially informed that he may be prosecuted for it, he shall be served with a notice in writing, which shall be explained to him, to the following effect —
>
> > 'You have been charged with/informed that you may be prosecuted for — [set out the charge]
> > Do you wish to say anything in answer to the charge? If there is any fact on which you intend to rely in your defence in Court, you are advised to mention it now. If you fail to do so before your trial, the Court may draw such inferences, adverse to you, as it may think proper. If you wish to mention any fact now, and you would like it written down this will be done.'
>
> (4) No statement made by an accused person in answer to a written notice served on him pursuant to subsection (3) shall be construed as a statement obtained by any violence, inducement, threat or oppression as is described in subsection (2), if it is otherwise voluntary.
> (5) In subsection (2) 'officially informed' means informed by a police or any other person charged with the duty of investigating offences or charging offenders.
> (6) The Court shall admit under subsection (1) a statement made by an accused if such a Statement is made after the impression caused by any such inducement, threat or promise as is referred to in subsection (2) has, in the opinion of the Court, been fully removed.

It will be recalled that Lamat's statement of 22 December 1990 was made under s 117(1), and his statement of 24 December was made under s 117(3) of the CPC.

The learned judges' judgment explains the section in some detail. It is noted that the section has made a substantial change in the accepted principles of common law. In particular the right of silence of a defendant has disappeared, in the sense that adverse inferences may be drawn from his refusal to put forward matters in his favour after a warning has been issued to him under s 117(3).

Subsections (3) and (4) have to be read together. The judgment goes on to say :

> We have, however, concluded that a statement after warning under s 117(3) is not to be ruled as inadmissible merely because the warning itself contains words that offend the rules as to what constitutes a voluntary confession. Undoubtedly, the words of the warning, because they effectively remove the right of silence and

A could be said to contain a threat, would at common law not be admitted as voluntary.

We agree. The prosecution therefore still has to show that the statement made after warning was a voluntary one, it being assumed that the wording of the warning itself is to be interpreted as being of threatening nature.

B

Challenges to admissibility of statements

Lamat in challenging the statement he made on 22 December alleged that PW7 ASP Pg Wahab made up the bulk of what was in the statement and he (Lamat) signed as he was told because he was in police custody and had C no choice. He however agreed that neither Wahab nor his witness Cpl. Sabtu offered him any violence. He agreed that no violence of any kind was used by any police officer.

The judges did not believe the allegations of improper behaviour made against Wahab. They accepted that what Wahab said was true and were D satisfied that Lamat's statement was voluntary.

It was also alleged on behalf of the defence that the police did not record what Lamat said but simply asked the latter to sign what the recording officer had written. It was further suggested that the warned statement made under s 117(3) was not admissible because the warning was not E 'explained' to him but merely read to him. In answer to this suggestion, the judges said:

> When the subsection uses the word 'explain' we do not think that it imposes any obligation upon a recording officer to dissect the charges and to attempt to inform the defendant as to what they mean. He is, however, obliged to inform the defendant, in a language which the latter understands, the charges which will F be brought against him and the effect of the warning which is issued. He need go no further than that.

The requirement, the judges found, was met.

Then a series of other complaints was made. These may be grouped under the title 'Oppression'. G

Oppression

Lamat's complaints may be summarized as follows:

(a) That he was kept in oppressive conditions in the central police station; H in particular, that he was required to wear only underpants or trousers.
(b) That he was made to sleep on a tiled floor, with no mattress or pillow and only one blanket.
(c) That meals were inadequate.
(d) That he was not allowed family visits until after his statements.
(e) That his custody was illegal, as his detention under the Public Order I Act was improper and he remained in police custody for almost a year.
(f) That he was taken twice, hooded, handcuffed behind and blindfolded to the police headquarters.

The trial court recognized that the manner in which detainees were kept in police custody was 'in some respects uncomfortable', but they were not prepared to hold that such conditions, without more, constituted such oppression as to render any statement given to the police by a detainee who had been subjected to them inadmissible on this ground alone.

As to complaint (d), the judges found nothing improper in restricting or forbidding visits by members of family where firearms were involved. Regarding (e), the judges observed that an examination of the Public Order Act suggests that Lamat should never have been detained under it. However, his statements were recorded within the period of 16 days permitted by the Act. The error on the part of the police in detaining him did not detract from the voluntary nature of any confession he made, if there was no evidence to suggest that he was influenced by any illegality of his detention.

The complaint under (f) was that the effect of the intervention of ASP Azahari and S/M Bagol was such that Lamat only made the statements because he feared that, if he did not sign them, he would again be hooded, blindfolded, handcuffed behind the body and taken to the police headquarters.

Both Azahari and Bagol admitted that the treatment described here was part of a 'special procedure', and this was adopted not only in firearms cases in December, but in other kinds of cases at all times of the year. The judges were not prepared to assume that such procedure must necessarily amount to oppression such as would vitiate a subsequent statement.

In this connection, the judges also assessed Lamat's background. Lamat had been a soldier for some 18 years. He was about 36 years of age. It was far less likely that he would feel a sense of oppression as a result of the special procedure, than would be the case, for example, 'with older or sicker persons'. Lamat was questioned in the early hours of 17 and 18 December. According to Lamat, he was not told who had taken him out of his cell, why he was to be interviewed, and by whom he was to be interrogated and where he was being taken. Lamat said that although there was a gap of four days between his special procedure interviews and that of Wahab, he was always in fear. He made the second statement because 'I was confused at the time I did so', and 'I was still always in fear'. Wahab's evidence was that he knew nothing of the interview by Azahari and Bagol.

The judges then went on to consider s 117(6) of the CPC and held that it must be inferred that the conduct referred to in that subsection must be intended to apply to any conduct such as would render a statement involuntary. They held that s 117(6) of the CPC is in effect a restatement of the common law in that if an act of 'oppression' (not mentioned in the subsection as it is in sub-s (2)) occurs, a statement by a defendant is not excluded if the act did not affect him when he made the statement. The question is: was there something which tended to sap and has sapped the free will which must exist before a confession is voluntary? — see *R v Priestley*.[1]

By a majority, the learned judges found that Lamat was not still so affected by his earlier treatment that his will was overborne thereby. They did not accept Lamat's evidence that he was so affected by fear of a

A possibility of being again subjected to the special treatment that he made a statement which he did not want to give, to Wahab, who had not been concerned with the special procedure at all.

Section 28 (2) and (3) of the Act

B Subsection (2) deals with lawful authority and sub-s (3) deals with lawful excuse (supra). The judges relied in their judgment on this issue in another case, *PP v Md Ali bin Burut et al.*[2] They observed that Lamat had not sought to establish any defence of lawful authority or lawful excuse. He simply denied possession of the articles specified in the charge. Their judgment C says:

> Lamat was a member of a security force until 1 April 1990. After that he was a civilian. He was not, therefore, a member of such a force on 13 December 1990, when the rounds were found, nor at any time since 1 April 1990. He could not have had any ammunition or explosive in his possession in connection with his duty as a member of such a force after 1 April 1990.

D

The grounds of appeal

Lamat's further amended grounds of appeal advances 13 grounds. The gist of those grounds are as follows:

E (1) Norlela's statements to the police were hearsay.

(2) Lamat's oral admission to the police on 13 December 1990 ought to have been excluded by reason that the prosecution have failed to prove the admissions were voluntary, or alternatively, the said admissions ought to have been excluded on the basis that to admit them would be unjust and unfair to Lamat.

F (3) Lamat's oral admissions made to the police on 18 December were obtained by oppression.

(4) Lamat's oral admissions made to the police on 18 December should be excluded for the same reasons as that given in para 2 above.

(5) Lamat's written statements to the police on 22 and 24 December G were obtained by oppression.

(6) The statements specified in para 5 above should be excluded for the same reasons as that given in para 2 above.

(7) The judges failed to give proper weight to Lamat's evidence that the ammunition and explosives referred to in charges 1 and 2 did not belong to him but were kept there by Lamat's brother Duraman. This H ground was abandoned.

(8) The prosecution failed to prove beyond reasonable doubt that at all material times Lamat did legally 'possess' the ammunition and explosives in question.

(9) There is no evidence at all linking Lamat to the ammunition and I explosives in question.

(10) The judges erred in holding that Lamat bears the burden to show that he had both lawful excuse and lawful authority on both charges 1 and 2.

(11) Charges 1 and 2 are bad in law in that:

(i) on 12 December 1990 Lamat was taken into custody and could not have possessed legally the ammunition in question; and

(ii) the ammunition was not recovered at the place specified in the charge but at the junction in Binutan, Tutong.

(12) In determining that Lamat had a case to answer, the learned trial judges erred in that there was no admissible evidence that the ammunition and explosives in question were in any way connected to Lamat.

(13) The conviction is unsafe and unsatisfactory.

We were in this appeal much assisted by counsel's written submissions.

Respondent's general reply

It is submitted on behalf of the respondent that the grounds of appeal might be grouped together under the general complaint of wrongful admission of evidence. To meet this complaint, counsel seeks to rely on s 371(1) (e) and (2) of the CPC, which provides:

(1) Subject to the provisions of sections 369 and 370, no finding, sentence or order passed or made by a court of competent jurisdiction shall be reversed or altered on account of —

(e) the improper admission or rejection of any evidence;

unless such error, omission, improper admission or rejection of evidence, irregularity, want or misdirection has occasioned a failure of justice.

(2) In determining whether any error, omission, or irregularity in any proceeding under this Code has occasioned a failure of justice, the court shall have regard to the fact whether the obligation (sic - should be 'objection') could and should have been raised at an earlier stage in the proceedings.

It is also argued that the phrase 'failure of justice' here means a 'fundamental' or 'substantial' failure of justice. In our view the descriptive words sought to be placed before the three words in sub-ss (1)(e) and (2) are otiose and meaningless. They add nothing to the already clear words in the sub-sections. A failure of justice is simply a failure of justice, ie where justice has failed. And it is impossible to think of a situation where justice has failed and yet a finding, sentence, or order which has occasioned the failure of justice is nevertheless permitted to stand.

Having said this, we have no doubt that there must be many situations which could be cured by the subsections now under consideration, provided always that no failure of justice is occasioned thereby. We do not think it necessary or desirable to define the parameter of the phrase 'failure of justice'. It is a concept so simple, and clear in itself, and so readily understood that further explanations may only confuse.

Norlela's evidence: ground 1

It is not entirely clear upon what basis the court below accepted Norlela's statements to the police. She made two statements, one at home after her

A brief conversation with Lamat in private; the other at the junction on Binutong Road where the green tin box was found. The judges found that her statement was made in the presence of Lamat. In making this finding, the judges were presumably referring to her first statement, for the second statement was made when Lamat was waiting in the car whilst Norlela, having alighted from the car, went over to point out the green tin box. The judges did not say whether Lamat had adopted Norlela's first statement as his own. Nor did they say whether the statement was admitted to prove the truth of its contents.

Counsel for the respondent however contends that Norlela's statements were admissible under s 6 of the Evidence Act, which provides:

> Facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction are relevant, whether they occurred at the same time and place or at different times and places.

The fact in issue is Lamat's possession of the ammunition and explosives in the charges, and of course his knowledge of these articles. It is a little difficult to see how Norlela's statements, made at home and at the junction on the Binutong Road, are so connected with the facts in issue in this case as to render them admissible under s 6. These words relate to Norlela and not Lamat; there is nothing to connect the words to Lamat's knowledge or possession of the offending articles.

These words however are relevant to show how it was that the police discovered the ammunition and explosives. In our views Norlela's words were admissible, not to prove the truth of what she said, but to prove her own knowledge of the existence and location of the green tin. These words did not attach Lamat with imputed knowledge.

If the court below were wrong, then s 371(1)(e) seems to apply.

Lamat's oral statements: grounds 2, 3 and 4

Counsel for Lamat insists that during the prosecution's opening and at the request of the trial judges, he submitted a written statement objecting to the admission of both oral and written statements alleged to have been made by Lamat. A copy of his statement was handed up to us, but it simply refers to statements, without specific reference to whether these were oral or written. Counsel for the respondent, who appeared for the prosecution in the court below, has no clear recollection of any objection to the admission of oral statements but he does recall the judges' request to defence counsel to make a written submission for the purpose of the voire dire as regards Lamat's two written statements. The transcript of proceedings prepared for this appeal is silent on this particular question, and there is nothing in the cross-examination of the prosecution witnesses on the voire dire which might give an indication that Lamat's oral statements had been improperly obtained. This court is therefore bound by the transcript of proceedings and must proceed on the basis that no objection to the oral statement was made.

It is then argued on Lamat's behalf that even if the defence had not objected to the admission of his oral statements, the trial judges should not

wait for objection to be taken to the admissibility of evidence, but should ask questions himself: vide *R v Ellis*.[3]

Viscount Simon LC, in discussing *R v Ellis*[3] in *Stirland v DPP*[4] said this (at pp 327–328):

> If that be the judge's duty, it can hardly be fatal to an appeal founded on the admission of an improper question that counsel failed at the time to raise the matter. No doubt, as [Bray J said at p 763] in the same case, the court must be careful in allowing an appeal on the ground of reception of inadmissible evidence when no objection has been made at the trial by the prisoner's counsel. The failure of counsel to object may have a bearing on the question whether the accused was really prejudiced. It is not a proper use of counsel's discretion to raise no objection at the time in order to preserve a ground of objection for a possible appeal. But where, as here, the reception or rejection of a question involves a principle of exceptional public importance, it would be unfortunate if the failure of counsel to object at the trial should lead to a possible miscarriage of justice.

Counsel also relies on *R v Watson*,[5] where Cumming-Bruce LJ, said (at p 295) that the judge must be satisfied that the prosecution have proven that the contested statement was voluntary, before allowing the jury to decide whether to act on it. And a little later in the same judgment, he said (at p 296):

> The matter is discussed by Professor Cross in his treatise on *Evidence* (5th Ed, 1979) at p 72, in which he refers to *R v Murphy* [1965] NI 138:
>
> 'The judge retains his control over the evidence ultimately to be submitted to the jury throughout the trial. Accordingly, if, having admitted a confession as voluntary on evidence given in the absence of the jury, the judge concludes, in the light of subsequent evidence, that the confession was not voluntary, he may either direct the jury to disregard it, or, where there is no other sufficient evidence against the accused, direct an acquittal, or, presumably, direct a new trial.'

We accept the accuracy of this statement of the law.

Then *R v Sang*[6] was cited, in particular the judgment of Lord Diplock (at p 1229):

> Nevertheless it has to be recognized that there is an unbroken series of dicta in judgments of appellate courts to the effect that there is a judicial discretion to exclude admissible evidence which has been 'obtained' unfairly or by trickery or oppressively ...

The law is clear, but here on the facts there was nothing to give rise to any anxiety on the part of the trial judges that statement might not have been voluntary.

Particular criticism however has been directed at the oral statement of 18 December that it might have been made as a result of oppression. The learned trial judges made no mention of this oral statement in their judgment.

According to the evidence of PW18 DSP Azman, he interviewed Lamat on 18 December in the conference room of the central police station. He made some notes in order to brief his superiors; he wanted to ensure that Lamat was not involved in any political activities in Brunei. He did not ask

A Lamat to make a written statement. He asked Lamat about his work and how long he had been in the RBAF. Lamat admitted having ammunition in his possession but not a firearm. Azman destroyed the notes he had made of the interview.

Counsel for the appellant makes the point that this interview took place after two midnight interrogations by Azahari. He also makes the point that B the admission by Lamat was equivocal. He contends that the two midnight interrogations were oppressive. In his written submission, he says:

> 3.2 The Crown case was that, shortly prior to that interview, the appellant was twice subjected to 'special procedure' interrogation. On 16 December 1990 at 0040 hours the appellant was taken from central police station blindfolded, C hooded and handcuffed behind his back and taken to Gadong police station for the purposes of special interrogation. He was returned to his cell at 0215 hours that date. That procedure was repeated between 2310 on 17 December 1990 and 0228 on 18 December 1990. On neither occasion was the appellant told who he was with, why or where he was being taken (judgment pp 33–36 R/A pp 36–40).

D

Whilst it is regrettable that the judges did not make specific reference to the oral admission of 18 December, they did discuss in full the instances which might amount to oppression when they were dealing with Lamat's written statement of 22 December to Wahab. It is in our view safe to infer that they would have, for the reasons they gave respecting the written statement of 22 E December, equally found the oral statement of 18 December to Azman voluntary.

Having said this, however, we think it highly desirable, that in the light of the conduct of the police, viz, special procedure, the trial judges should have conducted a voire dire in respect of the oral statement of 18 December. F In the light of the rest of our judgment we do not think it necessary to consider whether s 371(1)(a) of the CPC applies in this instance.

We have considered the second limb of grounds 2 and 4 and conclude that there is nothing in the argument that the trial judges should have exercised their discretion to exclude the statements.

G

Lamat's written statements: grounds 5 and 6

The allegation of oppression on the part of the police has been dealt with above under the heading: 'Oppression'.

A voire dire was held to consider the admissibility of Lamat's two written H statements, and the judges by a majority found these voluntary. Their conclusion was that whatever the conduct of the police, whether described as oppression or otherwise, at the end of the day Lamat's mind was not overborne. The question is not whether police oppression had been removed, but whether Lamat exercised his own free will when making his statement.

In the course of the hearing of the appeal, a point was made on Lamat's I behalf that when the police interviewed him he was informed he would be charged under regs 15 and 17 of the Arms and Explosives Act where the penalty thereunder was only a fine, as opposed to mandatory death sentence for offences charged under s 28 of the Act, thereby making it more likely

that Lamat was induced to confess. The basic facts in support of a prosecution under regs 15 and 17 are the same as that under s 28 Lamat was not misled on the facts. Quite unlike *R v Kwabena Poku*[7] where the suspect was misled as to the facts, such is not the case here.

We find nothing in counsel's submission that the written statements ought to have been excluded. In any event the statements do not relate to the time specified in the charges (infra).

Whether Lamat legally possessed the ammunition and explosives: ground 8

We shall examine this ground together with ground 11.

Whether there is any link between Lamat and the ammunition and explosives: ground 9

At the Tutong police station, when the contents of the green tin box discovered by Norlela were laid out on a table before Lamat, he admitted that these were his. This admission provides the link.

Lawful authority and excuse: ground 10

For reasons we gave in *Mohd Ali bin Burut et al v PP*,[8] our judgment is that the defendant has the burden of proving that he has lawful authority. He also has the statutory obligation of proving lawful excuse. On the other hand if he has lawful authority, he is not required also to prove he has lawful excuse. Section 28 of the Public Order Act makes this clear.

The charge was vague and misleading: ground 11

(i) The ammunition and explosives according to charges 1 and 2 were found at Lot 5921 Kampong Bintudoh, Lamunin, Tutong. According to the evidence, these were found at the junction on the Binutong Road. In our judgment this is a clear case for s 371(1)(a) of the CPC to apply. No one at the trial was misled by the error in the charges. Lamat cannot be said to have been prejudiced in any way. There was no failure of justice.

(ii) On 12 December 1990, Lamat was arrested and could not have possessed legally the ammunition and explosives. This ground is considered in conjunction with ground 8.

Counsel for the respondent relies on the learned trial judges's definition of possession:

> 'Possession' includes but does not require physical control, as the word 'carries' suggests. It also embraces the right to exercise power over the article concerned. It must be a conscious and deliberate possession and not merely a physical presence in the vicinity of the article.
>
> It does not depend upon ownership, as a person can be in possession of an article although he is not the owner of it.
>
> The words 'or under his control' extend the phrase 'has in his possession', so as to include objects which are not within the physical possession of a person but are subject to his control, such as objects which a person has buried or hidden.

A In *PP v Jamali bin Adnan* [1985] 2 MLJ 392 (at p 397) the trial judge commented as follows:

> 'For myself I would hold that mere knowledge of the whereabouts of offensive material cannot be equated to control. The mere fact that A knows where B has concealed firearms is not enough. There has to be something more. That something to my mind is an element of domination over the material. It must be shown at the very least therefore that the situation where the material is placed is such that the person who had knowledge of its whereabouts had also access of it and could at any opportune moment of his choice have obtained possession of it or the capacity to direct its disposal.'

B

C This means that control includes an ability to possess, though a person may not be in control if someone else is in possession.

Counsel argues that Lamat was in possession because he was in control of the ammunition and explosives. He knew where they were because he pointed out the hole to the police though Norlela had removed them. He must have had control up to 12 December at least. Counsel concedes, in D our judgment correctly, that at the time Norlela pointed out the tin box to the police, the police came into possession and Lamat could not be in possession. Counsel states that Norlela's knowledge could be imputed to Lamat. She threw the box away for him. Counsel frankly accepts that it is necessary for him to rely on Norlela's knowledge otherwise, 'I cannot establish the link between his possession and the articles found. Therefore E he continued in possession till the police seized them'. Counsel acknowledges that Norlela's knowledge was that of the box only and not its contents. Her knowledge was that of an innocent person. However, she was nevertheless Lamat's agent. Lamat, by naming Norlela, had the knowledge that Norlela had taken it away. He admitted that the contents in the tin box were his.

F The only time that Lamat could be said to be in possession was on or about 12 December and prior to his arrest at 2030 hours on 12 December. We do not know when Norlela removed the offending items to Binutong. It could be on or about 12 December or many weeks before: the oral and written statements did not make it clear. The written statement of 22 December mentions September 1989, early May and June 1990, but no G dates near 12 December. The written statement of 24 December simply says, 'The statement given by me is true and I plead guilty to the charge and I have nothing to say'. It would appear that the statement he said was true was the statement of 22 December (the only other written statement he had made), and the charge to which he pleaded guilty was a charge 'under rr 15 H and 17 of the Arms and Explosives Act (Cap 58)' that Lamat was in possession of the ammunition and explosives in question 'on 13 December 1990' when he was already in police custody.

There is no evidence that Norlela had any knowledge of the ammunition and explosives, only the tin box. There is no evidence that Lamat had entrusted the ammunition and explosives to her or that she was otherwise I his agent in possession. He could not be said to be acting through her. There is no incriminating knowledge or conduct on her part which could be imputed to Lamat. At the point of time when Norlela removed the tin box from the hole where Lamat had originally hid it, Lamat had lost both

control and possession. No doubt if he had noticed its disappearance from the hole and made enquiries from his wives he might have found out where these items were and regained possession of them, but until he did so he had lost possession. He was never able to regain possession, for when the offending articles resurfaced these came immediately into the possession of the police. There was no time for him to repossess.

The prosecution had failed to prove possession. For this reason the conviction cannot stand.

Grounds 12 and 13

Much of the arguments under these grounds had been argued in relation to other grounds. We do not think it necessary to deal with those grounds.

Conclusion

Appeal allowed. Convictions quashed. Sentences set aside.

Order accordingly.

Reported by Aslam Zainuddin